TOPICAL INDEX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES AND RULES

PAGE

TEXTS

No. 951

In the Supreme Court of the United States

OCTOBER TERM 1955.

RUDOLPH SCHWARE,

Petitioner

vs.

BOARD OF BAR EXAMINERS of the STATE OF NEW MEXICO,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

The respondent has no objection to the portions of the Petition entitled Opinions Below and Jurisdiction (Pet. pp. 2, 3). The respondent is dissatisfied with petitioner's statements required by Rule 40 (c) (d) and (e) and believe that these are more completely and accurately stated as follows.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

(a) *Constitution Provision* - U. S. Const. Amend. XIV, Section 1, Clause 2: ". . . .; nor shall any State deprive any person of . . . . property, without due process of law."

(b) *Statutory Provisions* - N. M. S. (1953 Comp.) § 18-1-8: "With the advice and approval of the Supreme Court, the board [of commissioners of the state bar] shall have power to constitute and appoint five (5) members of the state bar as a special committee to examine candidates for admission to the bar as to their qualifications, and to recommend such as fulfill the same to the Supreme Court for admission to practice under this act. The approval of the Supreme Court of such recommendations shall entitle such applicants to be enrolled as members of the state bar and to practice law, upon taking oath to support the Constitution and the laws of the United States and the State of New Mexico. Such special committee shall be known as the state board of bar examiners . . . . ." (Adopted as N. M. Sess. L. 1925, c. 100, § 7, amended N. M. Sess. L. 1949, c. 22, § 1. Now found in N. M. S. (1953) Comp.) Vol. 4, pp 84-85).

(c) *Regulatory Provisions*—(Reference is to Rules Governing Admission to the Bar of the State of New Mexico, now found in N. M. S. (1953 Comp.) Vol. 4 pp 85-89).

RULE I. Qualifications: "(1) . . . . An applicant for admission to the Bar either upon examination or certification and motion must be a citizen of the United States, an actual bonafide resident of the State of New Mexico for at least six months prior to admission, 21 years of age and of good moral character . . . ."

RULE III. Examinations: "(7) . . . Provided that the Board of Bar Examiners may decline to permit any such applicant to take the examination when not satisfied of his good moral character."

QUESTIONS PRESENTED FOR REVIEW

1. Is there a substantial Federal question of denial of due process presented by the New Mexico Supreme Court's adherence to the finding of its Board of Bar Examiners that the petitioner "has failed to satisfy the Board as to requisite moral character for admission to the Bar of New Mexico," which finding was made upon petitioner's application for admission to the bar and evidence introduced by the petitioner which showed:

(a) recommendations as to good character by the applicant's classmates, teachers and clergyman,

(b) history of membership and active and knowing participation in the work of the Communist party admittedly from 1932 to 1940 at applicant's ages of 18 to 26,

(c) repeated use of two different aliases during the period of his Communist Party activity,

(d) arrests, without convictions, on an unascertained number of occasions,

(e) discrepancies and omissions in the petitioner's application and testimony?

2. Is there a substantial Federal question of denial of due process presented by the New Mexico Supreme Court's adherence to the finding of its Board of Bar examiners that the petitioner "has failed to satisfy the Board as to requisite

moral character for admission to the Bar of New Mexico" where the Board had obtained confidential information concerning petitioner, the nature of which was not disclosed to the petitioner, but where *on the other hand*, this confidential information (1) was, according to the sworn pleading of the Board, *not* a basis of its decision, and (2) was not even looked at by those members of the New Mexico Supreme Court who joined in the decision here to be reviewed?

STATEMENT OF THE CASE

The respondent Board has the function of examining "candidates for admission to the bar [of New Mexico] as to their qualifications and to recommend such as fulfill the same to the Supreme Court for admission to practice" (N. M. S. (1953 Comp.) § 18-1-8). Qualifications include United States citizenship, certain educational and residence requirements, a bar examination or admission on motion of attorneys licensed in other states meeting established requirements (See Rules governing Admission to the ..., printed at N. M. S. (1953 Comp.), Vol. 4, pp. 85-89, and a "good moral character" (*ibid.* Rule I(1)). The respondent Board is authorized to decline to permit an applicant to take the bar examination "*when not satisfied of his good moral character.*" (*ibid.* Rule III(7)).

In December 1953, the petitioner applied for leave to take the examination on February 22, 1954. (Rec. p. 2). His application forms a part of the record here. Pursuant to notice, he presented himself for examination and was interviewed by the respondent Board. (R. p. 2) No transcript was kept of this interview but, at its close, the Board told the petitioner that he would not be permitted to take the examination and unanimously adopted a motion to the effect that the petitioner had failed to satisfy the Board as to his good moral character. (Pet. p. 1a) Subsequently, peti-

tioner obtained counsel who asked for a hearing which was held by the Board at Albuquerque on July 16, 1954.

A transcript of this latter meeting was made and this, together with petitioner's application documents, and the letters received in evidence at the meeting, comprises all of the evidence in this cause. (R. pp. 16-109) At the close of this meeting, the Board unanimously affirmed its resolution of February 22, 1954. (R. pp. 4-5)

It should be noted that it is the practice of the respondent Board to make written inquiries concerning applicants for admission to the bar and these inquiries are made by the respondent and answered by informants upon the express understanding that such information shall be held in strict confidence. (R. pp. 112-113) This procedure is expressly consented to by all applicants for admission and was so consented to by the petitioner. (R. p. 112) The information so obtained in the case of the respondent has never been disclosed to him but was not a basis for the Board's decision. (R. p. 113) The only bases for decision are to be found in the information contained in the application and in the transcript of the July 16, 1954 hearing (sworn Response to Petition and Order to Show Cause, First Defense, par. 10.). (R. pp. 112-113) Upon review of the Board's decision the four members of the Supreme Court of New Mexico who joined in its opinion did not look at this confidential information, although Judge Kiker, who dissented, did so. (Pet. p. 6a)

A narrative statement of the evidence is as follows: The petitioner was born in January 1914 and at the date of his application was 39 years of age. (App. Qu. 4) His father was a needles trade worker, a poor man. (R. p. 22) His father was an immigrant and along with most of his neighbors, a socialist. (R. p. 23) The petitioner grew up in this

environment. (R. p. 24) He began to work at nine years of age and continued to work part time while at school. (R. p. 25) He attended DeWitt Clinton High School in the Bronx, New York, from 1928 to 1932. (App. Qu. 5) While there, in 1932 he joined the Young Communist League after an occurrence in which the Communist students had impressed him in refusing to disband a club upon the demand of the school principal. (R. pp. 25-26) In connection with this occurrence, the applicant was suspended from school for approximately three days. (App. Qu. 16)

The petitioner joined the Communist Party in 1934 at the age of 20. (R. p. 26) In September to November 1933 he was employed in a pocketbook factory in Gloversville, New York. (App. Qu. 1, 3, 7) For the first time he used an alias, adopting the name of Rudolph de Caprio. (R. pp. 17-18) In his written application, he stated that he did so because he desired to organize the employees, most of whom were Italian, into a union. (App. Qu. 16) At the hearing in July 1954, he stated that he adopted an Italian name solely to gain employment. (R. p. 28) From February 1934 to February 1937 petitioner lived in Los Angeles, San Pedro, San Francisco and Berkeley, California, where he was a shipyard worker, longshoreman, warehouseman, and seaman. (App. Qu. 3) During this period he used the name Rudolph de Caprio. (App. Qu. 1b) This was, he testified, solely to obtain employment. (R. p. 28)

In the Communist Party the applicant used the names Rudy de Caprio or Joe Fliori, he does not recall which. (R. p. 52) In 1934 he was arrested "on several occasions" during the maritime strike. (App. Qu. 17b) He was booked under the name Joe Fliori (or Fliari), the name being assumed just to give to the police. (R. pp. 30-31) He derived no monetary benefit as a result of the name. (R. p. 31)

In February 1937 the applicant's father died and he returned to New York. (R. p. 34) He left the Communist Party at this time and resumed the use of his correct name. (R. p. 34) In 1938 he went to Detroit and apparently rejoined the Party. (R. p. 35) From March 1938 to February 1940 he was Secretary of Wayne County Workers Alliance and subsequently until June 1940 he was State Secretary of the Michigan Workers Alliance, both positions being in Detroit. (R. pp. 35-36) Petitioner was arrested in Detroit in 1940 for violation of the Neutrality Act of 1818 as a result of recruiting volunteers for the Spanish Republican government. (App. Qu. 17b) The charges under which he was arrested were terminated by nolle prosequi. (App. Qu. 17b) In 1940 or 1941 he was arrested in a town in Texas on a charge of "suspicion of transporting a stolen vehicle." (App. Qu. 17b) This charge was dropped by the authorities.

In late 1940 the applicant finally left the Communist Party. (R. pp. 36, 40) He testified he did so based upon disillusionment and the feeling that the party's officers were interested primarily in power. (R. pp. 35-36) During the period of his membership he appears to have been active in the work of the Party. (R. pp. 29-34, 61-63) His actions in connection with his arrests were governed largely by instructions he received from the Party. (R. p. 34)

In response to question in petitioner's written application to take the bar examination asking that he state every residence he had had since he was sixteen years of age, and indicating the name of the city and state, the street address and the period of time by month and year of each separate residence were to be given, petitioner stated that he had had ten different residences during the period March 1934 to January 1943, the latter date being the time he was inducted into the United States Army. (See Application in Record.)

He lived in California, New York, Illinois, Texas, Michigan and Indiana. He could recall only two street addresses. One was the home of his family in New York where he spent three months in 1937; the other was an address in South Bend, Indiana, where he lived approximately two years.

Another question on petitioner's application form sought information as to all employments he had had since the age of sixteen years, specifically asking for the time periods of such employment, exact addresses of offices or places where employed and the names and present addresses of all former employers. From March 1934 to November 1935, petitioner was employed as a machinist's helper at Bethlehem Shipbuilding Company, Terminal Island, San Pedro, California. He could not recall the name of his superiors. He left there to join the merchant marine. He then spent five months as a seaman, first on a freighter. He could not recall the name of the ship, but believed he worked for the Calmar Line, making no statement as to the whereabouts of its offices. Then he left that employment to sail on a steam schooner plying the Pacific Coast. He made no statement as to the name of his employer, or otherwise identified the schooner. After that he worked ten months as a longshoreman on the docks in San Francisco, Oakland and Berkeley, California.

Then after a trip to New York at the time of his father's death, he worked in a grocery store for some four months. He could not recall the name of the store or the owner. He worked two months in a vegetable processing plant in Rio Hondo, Texas. He could not recall the name of the plant or the owner.

The application states that from March 1938 to June 1940 he was in Detroit working with the Wayne County Workers Alliance and the Michigan Workers Alliance. The

offices were located on Grand River Avenue. He gives no names of associates. Upon leaving this work he was unemployed for a while then became regularly employed as a truck driver in South Bend, Indiana, for about two and a half years. One company for which he worked went out of business when the 1942 car production was halted. He gives the name of the company, the owner and the office address of his last employer in South Bend, which corresponds with the period of time ~~for~~ which he had given a residence address as earlier noted. This brought him up to the time when he was inducted into the army.

In January 1944 the petitioner was drafted into the Army, and was honorably discharged in 1946. (R. p. 37) While in the military service, he married, and at the time of the hearing had two children. (R. p. 18) Nine letters which he wrote to his wife while in the service in 1944 were offered as corroborative of his claim to be converted from Communism. (Applicant's Ex. 1-9, R. pp. 84-103) He has become a member of the synagogue in Albuquerque and its Rabbi testified that he was of good moral character. (R. pp. 75-77) Some seventeen letters from law professors and students and business associates were introduced into the record stating that petitioner is a person of good moral character, these letters being from persons who have known the petitioner in New Mexico where he lived from June 1950. (Applicant's Ex. 10, R. pp. 103-109) While in law school petitioner established an anonymous scholarship of $50.00 a year to be given to needy law students, which he has continued and hopes to continue indefinitely. (R. p. 43)

Following the deicsion of the respondent Board in 1954 petitioner filed a petition for review in the Supreme Court of New Mexico setting up some twelve bases of objection, including the due process clause of the Fourteenth

Amendment. (R. pp. 1-8) No question was raised as to the plenary power of the New Mexico Supreme Court to review the cause and its review admittedly embraced a decision of the petitioner's claim of denial of due process. (Pet. pp. 1a, 2a) The court regarded its review as plenary and a matter of original jurisdiction. (Pet. p. 1a) Based upon such review the Court adhered to the respondent Board's decision and "ruled that the petitioner's application to take the bar examination of the State of New Mexico is denied."

ARGUMENT

POINT I. No Substantial Federal Question of Denial of Due Process Is Presented by the New Mexico Supreme Court's Adherence to the Finding of Its Board of Bar Examiners That Petitioner Has Failed to Satisfy the Board as to Requisite Moral Character for Admission to the Bar Where Petitioner's Application and Evidence Included: (a) Former Adult and Knowing Membership in the Communist Party; (b) Repeated Use of Aliases; (c) A Number of Arrests Without Convictions; (d) Discrepancies and Omissions in Information and Evidence Supplied by the Petitioner.

A. *Summary of Petitioners Contentions.*

The petitioner has presented his argument under five points of which four may be summarized, referring to the Point numbers of petitioners' argument, as follows:

> Refusal to permit the petitioner to take the bar, (I) by reason of former membership in the Communist Party, (II) by reason of his use of aliases, (III) by reason of his record of arrests

without convictions and (V) by reason of all three of the foregoing together, is a denial of the due process of law.

The argument runs that the right to apply for membership in the bar is within the protection of the Fourteenth Amendment; that it cannot be denied by a State for irrational or arbitrary reasons or for reasons involving constitutionally protected rights and liberties; and that none of the three reasons referred to in Petitioner's Points I, II and III are constitutionally adequate to warrant the New Mexico Supreme Court's decision. There is, we believe, some question-begging and glossing over of facts in the phraseology of the petitioner's argument on these Points but we believe that the foregoing is a fair, although abridged, statement of it.

B. *Statement of Principles not in Dispute.*

The respondent believes that there is an area of agreement betwen the parties and that it will clarify the argument to delimit this area where the parties are not in dispute:

(1) We take it as undisputed that a state has broad powers in regulating the admissions of persons to the practice of law.

Re Summers, 325 U. S. 561, 570, 571; 89 L. Ed. 1795, 1802

> "The responsibility for choice as to the personnel of its bar rests with Illinois. Only a decision which violated a federal right secured by the Fourteenth Amendment would authorize our intervention."

(2) The right to apply for admission to the bar and to practice law, while not unqualified, is a right protected from arbitrary or irrational state action and within the protection of the Fourteenth Amendment.

Re: Summers, supra

But Cf. *Considerations on Determination of Good Moral Character* 18 U. of Detroit L. J., 195, 224

This was assumed in the opinion of the Court below (*Schware v. Board of Bar Examiners*, 60 N. M. 304; 291 P. (2) 607,608) which proceeded upon the assumption that membership in the legal profession "is a species of property as that word is employed in the Constitution." (Pet. p. 2a)

(3) The requirement that an applicant for the bar be of "good moral character" is ancient and universal.

St. 4 Henry IV, c. 18 (1402)

> ". . . . it is ordained and stablished that all Attornies shall be examined by the Justices, and by their Discretions their Names put in the Roll and *they that be good and vertuous and of good fame* shall be received and sworn . . . . ."

Re Stepsay, 15 Cal. (2) 71, 73; 98 P. (2) 489, 490

> "There is, of course, no question that one of the prerequisites to practice law in this state, and in all other jurisdictions so far as we are advised is the possession on the part of the applicant of a good moral character.

In re Hyra, 15 N. J. 252, 104 A. (2) 609

> "From the earliest days in this state it has been a rule of court that 'no person (shall) be admitted to such examination (to practice as an attorney at law) unless he . . . shall be of good moral character.' This rule is not peculiar to New Jersey; it is a universal requirement." (per Vanderbilt, C. J.)

Re Crum, 103 Or. 296; 204 P. 948, 950

> "Evidence that satisfies the court of the good moral character of an applicant for admission to the bar is required in all jurisdictions."

We assume, therefore, that a reasonable inquiry into and a fair decision upon an applicant's "good moral character" must be regarded as a part of the due process of law.

(4) Further, we assume it to be undisputed that as a matter of common and possibly universal practice among the several states the burden of proof to establish his good character is on an applicant for admission to the bar.

Re Garland, 219 Cal. 661; 28 P. (2) 354

Rosencranz v. Tidrington, 193 Ind. 472; 141 N. E. 58

Re Weinstein, 150 Or. 1; 42 P. (2) 744

Annotation, 28 A. L. R. 1140 at 1142
18 U. of Detroit, L. J. 195, at 228

> "Applicants must, under the rules, carry the burden of proving to the subcommittee that they are of good moral

character and have the necessary qualifications for entry to practice."

This is clearly the case in New Mexico under the language of the rule upon which the respondent Board acted.

Rule III (7) of the Rules Governing Admission to the Bar (found at N. M.S. (1953 Comp.) Vol. 4 p. 87)

". . . the Board of Bar Examiners may decline to permit any such applicant to take the examination when not satisfied of his good moral character."

(5) We do not understand that the petitioner contends that there was a lack of *procedural* due process in the present case except for the matters argued under his Point IV which is answered in our Point II in this Brief. Any question of procedural due process in this case is, therefore, limited to the question concerning the alleged evidentiary use of confidential information discussed under our Point II below.

(6) The review of the decision of the respondent Board's action was plenary involving appellate review of law and fact questions and was treated in the court below as "not limited by appellate rules, but the matter is considered originally." (Pet. p 1a)

(7) Finally, it is not here disputed that the decision of the New Mexico Supreme Court was a final judgement within the meaning of 28 U. S. C. 1257, and a justiciable case within the rule of *Re Summers*, 325 U. S. 561; 89 L. Ed. 1795.

C. *Decision Appealed from was warranted by the evidence.*

Assuming the foregoing seven matters as undisputed, the question here presented seems to be whether the decision of the Supreme Court of New Mexico was warranted that the petitioner had failed to satisfy the Court and the respondent Board of his good moral character. If a rational finding was made in the petitioner's case upon warrantable evidence, the requirements of due process, as we understand them, have been satisfied.

The petitioner in his Point V contends that for the purpose of determining the constitutional adequacy of the evidence, he may inspect and reject each of the three grounds mentioned in the Board's resolution (Pet. p. 1a) separately. It should be remembered, however, that this is a review of a finding on the petitioner's "good moral character"; that, as stated by the court below "Character cannot be laid upon a table" for examination (Pet. p. 1a); and that a survey of all the evidence together is necessary for a fair review of the bases of the court's decision. Each relevant aspect of the evidence ". . . . was a circumstance to be considered and, although taken alone it might not have made out a case, yet, as it was only a portion of the evidence, the . . . (Court) . . . was not required to rule to that effect, and thus to break one by one the sticks which were relied upon only when bound together in a fagot." *(Collins v. Greenfield,* 172 Mass. 78, 81; 51 N. E. 454, *per* Holmes, J.)

(1) *Former Communist Party Membership.* - The petitioner concedes "that past non-innocent membership in the Communist Party might have been constitutionally considered insofar as it might be relevant to Schware's present moral character." (Pet. p. 10) This concession is in accordance with our reading of the cases. The cases decided by this Court have made a clear distinction between statutory and regulatory requirements which condemn *innocent* and *knowing* participation in proscribed organizations. It

is denial of due process to condemn alike persons acting with and without knowledge of the sinister purposes and methods of the Communist Party and its affiliates.

Weiman v. Updegraff, 344 U. S. 183; 97 L. Ed. 216

but *knowing* participation may properly result in disqualification from offices of public trust and importance.

Gerende v. Board of Supervisors, 341 U. S. 56; 95 L. Ed. 745

Garner v. Board of Public Works, 341 U. S. 716; 95 L. Ed. 1317

Adler v. Board of Education, 342 U. S. 485; 96 L. Ed. 517

We assume that it is too clear for dispute that the Communist Party is a conspiracy of disloyalty, deception, violence and disorder and that knowing membership in it is incompatible with accepted standards of "good moral character."

American Com. Assoc. v. Douds, 339 U. S. 382; 94 L. Ed. 925

Dennis v. U. S., 341 U. S. 494; 95 L. Ed. 1137

Adverse inferences from Communist Party membership have been held to warrant exclusion from the practice of law on the ground of lack of good moral character.

Re Anastaplo, 3 Ill. (2) 471; 121 N. E. (2) 826 Cert. den. 348 U. S. 946, reh. den. 349 U. S. 908

Martin v. Law Society of B. C., 3 Dom. L. R. (1950) 173

See also *Sheiner v. State*, (Fla.) 82 S. (2) 657

As a matter of common sense, which must have some relevancy to due process, therefore, former membership in the Communist Party would seem clearly to warrant discreditable and disqualifying inferences unless such membership was as petitioner states "innocent."

Despite the statement in petitioner's Brief(esp. p. 8) there can be no real doubt of *scienter* respecting his Party membership. He was an adult for most of his membership period. He was not merely a philosophical Marxist but was active in the work of the party including arrests in the course of activities it promoted. (Rec. pp. 29, 30, 31, 32) His actions were governed largely by instructions which he received as a member of the Communist party. (Rec. p. 34) He appears to be cognizant of Party discipline and methods. (Rec. pp. 61-63)

In addition to the foregoing, we suppose it is reasonable and fair to infer that one who had been a member of the Communist Party admittedly for six years knew its nature. In *Weiman v. Updegraff*, 344 U. S. 183; 97 L. Ed. 216, the possibility of innocent or unknowing membership in affiliated organizations was discussed and indeed was considered decisive. There is no common sense reason why this principle should apply to membership in the Communist Party itself. Innocent participation in the Communist conspiracy seems to us as to Chief Justice Stone preposterous.

Schneiderman v. U. S., 320 U. S. 118, 195-6;

87 L. Ed. 1796, 1839

Stone, C. J. dissenting: "It would be a little short of preposterous to assert that vigorous aid knowingly given by a pledged Party member in disseminating

> party teachings, to which reference has been made, is compatible with attachment to the principles of the Constitution. On the record before us it would be difficult for a trial judge to conclude that petitioner was not well aware that he was a member of and aiding a party which taught and advocated the overthrow of the Government of the United States by force and violence."

To an extent, therefore, the petitioner's past non-innocent membership in the Communist Party constitutionally warranted the decision under review. The reasoning mind would give it weight in evaluating his moral character and consider it as adverse to the petitioner in his efforts to "satisfy" the Examiners of "his good moral character."

(2) *Use of aliases.* The respondent Board of Bar Examiners next relied upon the petitioner's use of aliases for a period of years as a basis of their decision that they were not satisfied as to his moral character. The petitioner appears to have used two names other than his correct name. (Rudoph de Caprio and Joe Fliori or Fliari) throughout the period 1933 to 1937 (App. Qu. 1b and 7) and to have used one name or the other, he cannot remember which, while in the Communist Party presumably until 1940. (Rec. p. 52) While regularly using the name Rudolph de Caprio, on occasions when he was arrested he used the name Joe Fliori just to give to the police. (App. Qu. 1b and 17b and Rec. pp. 30-31)

The petitioner in his Argument describes the foregoing as "the exercise of the ancient common law right to use an alias" (Pet. p. 10) and considers that it is a denial of due process to draw adverse inferences from it. He cites a num-

ber of cases recognizing the validity of voluntary change of name and relies upon the fact that many historical personages have changed their names. There is he contends "an absence of rational relationship" (Pet. p. 12) between use of aliases and inferences adverse to "good moral character." Paradoxically, while now making the argument that the use of aliases is lawful and not discreditable, he contends that there is nothing to show his present attitude towards the use of aliases, although he implies that he now disapproves of the practice. (Pet. p. 10 footnote)

In all candor, is the present case comparable with a voluntary change of name or the professional adoption of a *nom de guerre?* Is it like St. Paul changing his name from Saul of Tarsus as the dissenting judge stated in the Court below (Pet. p. 30a)? We submit that it is manifestly different. The common law right to change ones name properly may be exercised for a *lawful* purpose *(Re Zanger,* 266 N. Y. 165; 194 N. E. 72) and without intent to deceive (65 C. J. S. 19). An accused's assumption of a false name is universally considered to be evidence of consciousness of guilt and thus of guilt itself. (II Wigmore on Evidence, (3ed.) 111.) Changes of name to escape proof of identity on arrest, and to appear as an Italian the better to organize Italian workers, would seem clearly to indicate a capacity for deceit and subterfuge wholly inconsistent with the nice professional honor required of an attorney at law. We cannot see a candid argument to the contrary. Surely an adverse inference is constitutionally permissible where we believe no rational person would make any different deduction. The Court below cannot properly be said to have denied the petitioner the due process of law (a) in concluding that such conduct indicated former lack of requisite moral character, and (b) in drawing a further adverse inference from the petitioner's present attempted justification of such conduct.

(3) *Record of arrests.* The petitioner treats this portion of the facts rather lightly. His counsel summarizes it by saying that he "had the unfortunate experience of being erroneously arrested three times." (Pet. p. 12) He further states that the New Mexico Supreme Court "ruled that arrest without prosecution or conviction is a bar to admismission to the Bar." Both these statements of the Petition are incorrect.

The petitioner stated in his application that he was arrested in 1934 "on a number of occasions" (App. Qu. 1b) and "on several occasions" (App. Qu. 17b) during the maritime strikes in California. At his hearing the petitioner stated that he was arrested twice during a strike or strikes at San Pedro. (Rec. p. 29) He was on these occasions booked for "suspicion of criminal syndicalism" under the name Joe Fliori although he had been using the name Rudolph de Caprio during that period. The petitioner believed that the crime of criminal syndicalism consisted of the commission of an act to overthrow or subvert the state government. (Rec. p. 30) He made no explanation whatever of the conduct that led to his arrest merely pointing out that he had read in a San Pedro newspaper that there were 2-3000 people arrested in about 66 days over 200 of them on "suspicion of criminal syndicalism." (Rec. p. 29) The petitioner was indicted and arrested in 1940 in Detroit for violation of 18 U. S. C. A. § 959 (a). He had been engaged in recruiting volunteers for the Loyalist side in the Spanish revolution. (Rec. pp. 32, 33) The charges were nol-prossed. The petitioner stated that he did not know that his recruiting activity was unlawful. (Rec. p. 33) The petitioner was also arrested in 1940 or 1941 in Texas on suspicion of transporting a stolen vehicle and was released after two or three days investigation which exculpated him. (Rec. p. 33-34)

We have therefore, not three erroneous arrests, as petitioner would have us believe, but an unascertained number of arrests, as to all but the last of which discreditable inferences can properly be drawn. Moreover, the Supreme Court of New Mexico did *not* rule these arrests to warrant of themselves refusal to permit the petitioner to take the bar examination. The court, quite rationally we submit, considered the arrests and the use of aliases and petitioner's present attitude towards them as contra-indicating good moral character. (Pet. p. 21a)

> "He does not today appear to bear the weight of this deception upon his employers and the police as dishonesty, but simply as an excusable expedient. Furthermore, he excuses his arrests in California upon the ground that many others were arrested too. With respect to the arrest in Detroit, for activity in violation of a Federal statute, we take it that he regards his work in obtaining recruits for a foreign war as even commendable because he had concluded which side is right."

The record of arrests, their uncertainty in number and details, the lack of adequate explanation of their circumstances and the petitioner's present attitude towards them alike lend support to reasonable misgivings as to the petitioner's moral character.

(4) *Discrepancies and Omissions.* - All of the evidence in the present case came from the petitioner and his witnesses, most of it from the petitioner personally. There were in it two features which the Court below pointed out as warranting, along with the other evidence, its decision.

(a) In his application of December 1953 the petitioner stated that he had adopted his first alias because "I was of the opinion that union organization work would be facilitated if I adopted an [Italian] alias." (App. Qu. 1b) In his oral testimony in July 1954 he stated that he had adopted the name "De Caprio" solely to gain employment (Rec. p. 28) and had used this name solely for this reason in California. (Rec. p. 28) In neither the application nor his oral testimony did he explain why he used the names Rudolph De Caprio or Joe Fliori in the Communist Party nor did he explain the extraordinary circumstances that he was uncertain as to which name he used in that connection. (Rec. p. 52)

(b) The application form which the petitioner submitted calls for considerable detail in information concerning addresses and employments. The purpose of obtaining such information is obvious. The Supreme Court of New Mexico examined the information submitted by the petitioner with considerable care (See Pet. pp. 14a and 15a) and concluded:

> "The summation of all this is that for approximately nine years petitioner has provided only one residence address other than the home of his parents in New York. Over that period, he has given only one personal name of an employer, for whom he also gave a completed address in South Bend, Indiana, and only the street name for the location of the two Workers' Alliances he was connected with in Detroit. This adds up to slightly more than a complete blank." (Pet. p. 15a)

D. *The State Court's decision was warranted in a constitutional sense.*

We conclude that the several factors relied upon jointly by the New Mexico Supreme Court in reaching its decision in this case were logically relevant to the issue and that the deductions made by the Court were logical and rational. If this is true there has been no violation of the petitioner's rights, no violation of the due process clause. The petitioner is guaranteed by the Fourteenth Amendment against irrational and arbitrary state action and against invasion of his constitutional rights and liberties. We submit that there is no basis for a claim of any of these in the present cause.

POINT II. No Substantial Federal Question of Denial of Due Process Is Presented by the New Me. o Supreme Court's Adherence to the Finding of Its Board of Bar Examiners That Petitioner Has Failed to Satisfy the Board as to Requisite Moral Character for Admission to the Bar where Confidential Information Obtained by the Board Was Not a Basis of Its Decision Nor of the Court's Decision.

A. This Point is responsive to Petitioner's Point IV. (Pet. p. 14) Petitioner there contends that because the respondent Board obtained confidential information concerning him which was not disclosed to him he has been prejudiced. The petitioner's argument refers to this information as "derogatory" and to the informants as accusers". (Pet. pp. 14, 15) He omits reference to the fact that the *sworn* pleading of the respondent Board is to the effect that its decision was not based upon any such confidential information. (Rec. pp. 112, 113) There is nothing in the record to indicate what the nature of this confidential information may be. And the opinion of the Supreme Court of New

Mexico makes clear that none of the judges who joined in that court's decision even looked at such confidential information. (Pet. p. 6a)

B. The question raised by this Point sems to us to be quite simple. Is there a violation of due process in failing to disclose confidential information which was *not* a basis of either the decision of the Board of Bar Examiners or of the Court? Does the right of cross-examination or confrontation, assuming it, as we do, to be embraced in due process, extend to evidence *not* considered by the finders of fact? These questions answer themselves.

The two cases cited by petitioner do not suggest an affirmative answer. In *I. C. C. v. Louisville & Nashville R. Co.*, 227 U. S. 88; 57 L. Ed. 431, it was held that an Interstate Commerce Commission order lacking supporting evidence could not be considered warranted by an assumption that the Commission acted upon other evidence not in the record. In *Morgan v. U. S.*, 304 U. S. 1; 82 L. Ed 1129, an Agriculture Department's price fixing order was held not to comply with a *statutory* requirement that it be made after a "full hearing." Neither case bears upon the present situation where the petitioner was fully apprised of the evidence upon which the Board's and the Court's decision was based; and, indeed, himself introduced all of the evidence. Rather, the present case would appear to be clearly governed by the principle of *Barsky v. Board of Regents*, 347 U. S. 442; 98 L. Ed. 829, where the decision of the New York Board of Regents was held not to violate due process, there being no showing that the Board in reaching its decision relied upon certain evidence claimed to be irrelevant. The present case is stronger in this respect than the *Barsky* decision since it affirmatively appears that neither the Board nor the New Mexico Supreme Court relied upon the challenged evidence.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

RICHARD H. ROBINSON

FRED M. STANDLEY,

Attorney General and
Assistant Attorney General of
New Mexico
Santa Fe, New Mexico

W. A. SLOAN

Attorney at Law
Albuquerque, New Mexico
Attorneys for Respondent
Board of Bar Examiners